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WHEN DIVIDEND IS REGARDED AS INCOME OF STOCKHOLDERS.

In the case of United States v. Guinzburg, decided December 14, 1921, by the United States Circuit Court of Appeals (Second Circuit), it appeared that the defendant was a stockholder in the I. B. Kleinert Rubber Co; that on Feb. 17, 1913, that company declared a dividend of 18 per cent. to common stockholders of record on January 30, 1913; that the dividend was declared out of profits earned during the year 1912, and was payable July 1, 1913. This had been the custom of the company for many years. The payment of the dividend was postponed until July 1 for the purpose of permitting the company to use the money during that time, and thereby avoid borrowing money. Between the time this dividend was declared and the time it was made payable, the Federal Income Tax law became effective. The question was whether the defendant should have included the dividend paid him on his stock in his return for 1913.

The Income Tax Act as of March 1, 1913, provides:

"A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided, and a like tax shall be assessed, levied, collected and paid annually upon the entire net income from all property owned and of every business, trade or profession carried on in the United States by persons residing elsewhere."

"D. The said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December thirty-first, provided, however, that for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen, both dates inclusive * * *."

The Court held that defendant properly omitted the amount of the dividend from his return.

Dividends belong to the persons who are the owners of the stock at the time they are declared, without regard to the time during which they were earned, and although they are made payable at a future date. When declared, the stockholders become creditors of the corporation to that extent, and a vested right is created in favor of the stockholders. By the declaration of the dividend the earnings of the company to the extent declared were separated from the property of the corporation and were appropriated by that action to the then stockholders. The stockholders thereupon, became creditors, on a par with other creditors of the corporation. Their rights became vested and fixed the moment the dividend is declared.

We quote from the opinion of the court as follows:

"Anything which accrued prior to March 1, 1913, was part of the taxpayer's principal at the time when this act became effective. Property held prior to March 1, 1913, must be considered as capital, and the dividends in question must be treated as such. The act provides that "the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States * * *" shall be taxed. Accumulations that accrued to a corporation prior to January 1, 1913, were held to be capital and not income for the purposes of the act in Southern Pacific Co. v. Lowe, etc. (247 U. S. 330). The term "income" has been held to have no broader meaning in the 1913 act than in the 1910 act (Stratton's Independence v. Howbert, 231 U. S., 417). The Supreme Court based its

conclusions in the Southern Pacific case (supra) upon the view that it was the purpose and intent of Congress, while taxing the entire net income "arising or accruing" from all sources during each year, commencing the 1st day of March, 1913, to refrain from taxing that which, in mere form only, bore the appearance of income accruing after that date, while in truth and substance it accrued before. Under the 1909 act the expression "income received during such year" was held to look to the time of realization rather than the period of accrument, "except as a taking effect of the act on a specific date (January 1, 1909) excludes income that accrued before that date" (Hayes v. Gauley Mt. Coal Co., 247 U. S. 193). In the Hayes case it was held that income received within the year for which the assessment was levied, whether it accrued within that year or some preceding year, when the act was in effect, could be taxed, but it excluded all income that accrued prior to January 1, 1909, although afterwards received while the act was in effect. So where value was received by shareholders on the surrender of their certificates of stock where the company sold all its property and made final distribution of the proceeds to the shareholders, and where the amount received by each was twice the par value of the stock, but represented no increase since the effective date of the act, it was held that it did not "arise or accrue" after the act became effective."

The Court distinguishes between this case and cases where commissions are to be received at a future date upon a contingency. In such cases there is no fixed certainty of such receipt, and it has been held that the "income" has not accrued.

On the other hand, dividends declared and paid in the ordinary course by a corporation to its stockholders after March 1, 1913, whether from current earnings or from surplus accumulated prior to that date, have been held to be taxable as income to the stockholder (Lynch v. Hornby, 247 U. S. 339). "We deem the legislative intent manifest only if and when and to the extent that his interest in them comes to fruition as income, that is, in dividends declared," said the court in Eisner v. Macomber, 252 U. S. 204.

B.

NOTES OF IMPORTANT DECISIONS.

DELIVERY OF MILK CANNOT BE SUBSERVIENT TO WAGE CONTROVERSY.—"Uninterrupted delivery of the milk supply to the people of this city is so vital for the preservation of the general health of the community, and especially children and invalids, that any organized effort to interfere therewith must be regarded as an act of hostility to the public weal and such an unlawful purpose as calls for the exercise of the full authority of the courts and police authorities. Whatever may be the right or wrong of the present wage controversy, the health of this entire community cannot be made subservient thereto. Picketing and other acts alleged against the defendants have been held not to be unlawful under ordinary conditions, but when linked with a purpose inimical to the welfare of the community they become unlawful. This court would hesitate in an ordinary wage dispute to grant the relief asked for herein, but feels that it is its duty to assert the full power of the court under the circumstances to protect the lives and health of the people of New York. The motion to restrain the defendants is therefore granted, with notice to the defendants that any disobedience of the order herein will be visited with the fullest measure of punishment within the power of this court." Gottlieb v. Matckin, 117 Misc. 128, 191 N. Y. Supp. 777.

HOTEL BALCONIES EXTENDING OVER LOT RESTRICTED TO PRIVATE DWELLINGS VIOLATES SUCH RESTRICTION.—In the case of Loudenslager v. Pacific Improvement Co., 115 Atl. 752, decided by the Court of Errors and Appeals of New Jersey, holding that hotel balconies extending over a lot restricted in its use to private dwellings violated such restriction, the Court said:

"The restrictive covenants here in question provide that private dwellings only shall be built on the lots referred to in the bill, and that no portion of any building shall be erected on the lots within 3 feet of the rear dividing line of any lot, nor, except porches and steps, within 18 feet of the front property line. Under the averments of the bill the building of defendants must be understood to be a hotel, and the iron balconies described in the bill must be understood to be a part of the hotel

building. These balconies, while not resting on the lots, extend over them. To that extent the lots are utilized for the hotel building. The balconies are also erected over the 3 feet adjacent to the rear line of the lots, whereas the covenant restricts that territory unless the words 'rear dividing line' should be understood as referring only to rear lines which divide restricted lots. I am unable to discern any difference between building parts of a hotel on and extending parts of a hotel building over a tract of land on which a hotel cannot be built; nor am I able to discern, except in degree, any difference between extending parts of a hotel over land on which a hotel cannot be built 10 inches and 10 feet. Nor am I able to now determine that the 10 feet high stone wall which the bill describes as running from the easterly side of the building to Stenton place is not violative of the covenant contemplating that no building shall be erected nearer than 18 feet from Stenton place, that covenant specifically excepting only open porches or front verandas of buildings, which porches are permitted to extend not nearer than 8 feet from Stenton place, and steps or approaches from Stenton place to porches or buildings, which steps or approaches shall be, like porches, free from lateral obstructions to view."

RECENT DECISIONS IN THE BRITISH COURTS.

In consequence of the heavy rate of income tax at present prevailing, questions as to the payment and incidence of that tax as between various interests are occurring on all sides. The latest question arose in Booth v. Booth, 1922, 66 S. J. 251 in regard to the competency of providing in a separation deed as between husband and wife for payment of a certain annual sum free of income tax. The Income Tax Act, 1918, provides: "(1) a person who refuses to allow a deduction of tax authorized by this Act to be made out of any payment, shall forfeit the sum of fifty pounds; (2) every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void." In Booth v. Booth, a husband had covenanted in the separation deed to pay his wife "such weekly sums as shall, after deduction of income tax, amount to £260 per annum." It was contended that this provision was a covenant to pay the amount free of income tax and was therefore void, under the rule just quoted. The point was contested in the Oldham County Court, where the judge accepted this view, purporting to follow certain dicta in Blount v. Blount (1916, 1 K. B. 230). But the Divisional Court, on appeal, took the commonsense view that the real meaning of the covenant was a promise to pay such sum as, after deduction of tax, would amount to £260 per annum, and so held the covenant to be valid.

Damage from popular riot is another matter which has lately come before the courts with some frequency. In Freeman v. Receiver for Metropolitan Police District, 1922, L. J. 44, an action was brought by the plaintiff, as lessee of an unoccupied house in Vauxhall, for damages because of its partial destruction in the Peace Celebrations of June 28, 1919, the grievance being that doors had been wrenched off, windows torn out, and partitions broken down to provide fuel for bonfires which had been lighted in the street, and which caused crowds to assemble of so formidable character that it was impossible to interfere with them. The police of the district did not, in fact, interfere, but it was generally agreed that the crowd was a jolly and good-humored one, and that the premises had long been regarded as derelict, people helping themselves at will to wood and other articues of fuel from it. The Receiver was sued under the Rent (Damages) Act, 1886, which gives a right to compensation out of the police rate of the district where a shop, house or building has been injured or destroyed "by any persons riotously and tumultuously assembled together," and together with various technical defences (which appear not to have been seriously argued) he denied that persons were riotously or tumultuously assembled on the occasion referred to. The criteria for a "riot" were laid down once for all by the Divisional Court, after an examination of all the authorities, in Field v. Metropolitan Police Receiver (1907), 76 L. J. K. B. 1015, where it was held that five elements were necessary: (1) A number of persons not less than three; (2) a common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another, by force if necessary, against any persons who might oppose them in the execution of the common purpose; and (5) force or violence not merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. This decision has been applied quite recently by Mr. Justice Bailhache in the case of Ford v. Receiver of Metropolitan Police (1921), 90 L. J., K. B. 929, where the learned judge held, under similar circumstances to those in the present case, not only that peace celebrations might constitute a legal riot, but that the police authority was not entitled to demand from a claimant proofs of the evidence on which he relied for support of his claim (being himself in a better position to obtain information on the matter than the claimant would be), and that his refusal to act until supplied with such proofs was a re-

fusal to fix compensation for which he might be sued under the Act. In the present case, after a hearing extending over two days, Mr. Justice Shearman, while expressing his regret that he had not had the assistance of a jury, who might possibly have known better than himself what was to be expected from people in the Vauxhall district, found that "a common purpose existed to resist all persons who might try to stop the crowd, and that the crowd behaved in such a manner as to cause ordinarily and reasonably courageous persons to keep out of the way." That constituted a riot, notwithstanding that the good-natured crowd was only out for the peace celebration, and so the Receiver was ordered to pay the damages.

The principle of construction *ejusdem generis* has in Ambatielos v. Anton Jurgens, 1922 L. J. 34, been applied in interpretation of the term etc. which is often so very loosely thrown into the wording of commercial agreements. That was a claim for demurrage, and the clause in the charterparty to be construed ran: "Should the vessel be detained (beyond 14 working days) by causes over which the charterers have no control—viz., quarantine, ice, hurricanes, blockade, clearing of the steamer after the last cargo is taken over, etc.—no demurrage is to be charged." The steamer was, in fact, detained by a cause over which the charterers had no control, namely, a strike of dock laborers, and the charterers claimed to be exempted from demurrage under the clause set out above. Had the words in parenthesis —from "viz." to "etc."—been omitted, clearly there would have been no liability, and the question for the court was whether these words qualified and limited the general words, and, if so, how far? The rule of law as laid down by the House of Lords in Alexander v. Hansa (1920, A. C. 88), is that a charterer who has undertaken to load or unload within a certain number of days is answerable for the non-performance of the contract, whenever the nature of the impediments, unless they are clearly covered by the exceptions in the charterparty, or arise through the fault of the shipowner or his servants (see per Lord Wrenbury, at p. 100). In the case under consideration strikes were not expressly excepted, and unless the general words governed the whole clause, the charterers must find salvation in the etc. Mr. Justice McCardie held—and we think rightly —that he was obliged to read the clause as a whole; and, further, that the word viz.—which it was pointed out is not the same as e. g.—limited the exception to the words in brackets. This, then, threw the charterer back to the etc. The learned judge was no doubt justified in acceeding to the argument that etc. is an expression so vague as to be meaningless in a commercial document—that if parties will use such indefinite words they must not expect the Courts to discover their meaning. Mr. Justice McCardie, however, did not stop there. He bravely applied himself to the task of giving a meaning to the meaningless, and, in effect, found that etc. meant "and other things of the same kind as those specifically mentioned." In other words, he applied the well-known *ejusdem generis* rule, and, applying it, held that strikes did not come within the exception, because the specifically excepted causes were all of them due to some "over riding power of man or nature." Why, on this rendering, strikes should not be included, it is rather difficult to follow. Is not a strike due to some "over-riding power of man," to wit, the members of the union who order the strike? Or perhaps the learned judge is inclined to the view that strikers owe their origin to some power neither human nor divine, but diabolical? We commend to shipowners and charters alike the plain words of Lord Macnaghten in Elderslie Steamship Co. v. Borthwick (1905 A. C. at p. 96), "an ambiguous document is no protection."

A good illustration of the vital doctrine of *intention* in contract occurred in Jackson v. Silver, 1922 L. J. 28. The plaintiff, a dealer in foreign currencies, sued for £300 as damages for conversion of 250,000 Russian Imperial roubles. The defendant was an outfitter. A circular letter from the plaintiff quoted prices for various foreign currencies, all at so much per £1 sterling, and at the end there was what looked like and read as an offer of 7,500 roubles per £1. The defendant replied in terms ordering 250,000 roubles at 7,500 "to the £1." The plaintiff sent the roubles and received a cheque for £33:6:8d. To this he objected, on the ground that a mistake had been made, and made under such circumstances that it would be fraudulent on the defendant's part to be allowed to profit by it. The mistake was that roubles were not 7,500 for £1, but for £10. It is, it seems, customary for roubles to be quoted at "per £10," and not "at per £1," as is the case with other currencies. But how, said the defendant, was a poor outfitter in the provinces to know this? This was soon cleared out of the way, for the learned judge held that he did know. The case then stood thus: Offer of roubles at 7,500 per £10, and acceptance at 7,500 per £1. In other words, no acceptance, and therefore no contract, because the parties

were not *ad idem*. In Smith v. Hughes (L. R. 6 Q. B. 597), which is the *locus classicus*, Hannen, J., said that for the defendant who had made the blunder to obtain relief he must prove "not merely that the plaintiff believed the defendant to believe that he (defendant) was buying old oats, but that plaintiff believed the defendant to believe that he (plaintiff) was contracting to sell old oats." And Cockburn, C. J., put it: "The promisor is not bound to fulfill a promise in a sense in which the promisee knew at the time that the promisor did not intend it." The result in Jackson v. Silver was that as there was no contract of sale, and as the defendant had refused to return the roubles, the property had never passed, there had been a conversion, and the defendant was liable in trover for the value of the roubles at the market price on the date of conversion, that is, £10 for each 7,500, or £300 more than the £33:6:8d for the 250,000 roubles sent.

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THE DOMICILE OF PERSONS IN THE ARMY AND THE NAVY.

In some earlier numbers of this Journal the writer tried to show what the law was which governed the domicile of a married woman[1] and the domicile of an infant.[2] In this article he wishes to indicate what the law is which determines and governs the domicile of those persons who are members of the military and naval forces of the United States and of Great Britain. The conclusions reached will necessarily need to be very tentative as the adjudicated cases, so far as the writer has been able to discover with the most earnest research, are extraordinarily few. He has been able to find only twenty cases, all told, which are in point. Of these only one has been decided since the close of the World War. There must surely be others but the writer has been unable to find them. And conclusions on so important a topic as domicile must, necessarily, be tentative.

A person's domicile is his legal home.[3] It is the place to which the State will look when it wishes to find him for various purposes to which the law of the place of his domicile will apply.[4] The purpose of the law of the domicile is to control the activities of the person. As no one can be permitted to exist without being subject to some law, each person must have a domicile somewhere. Ordinarily a person is free to change his domicile at his pleasure. To do this *animus et factus* must concur. He must intend to adopt a new domicile and do some overt act which makes this intention clear. It is for this reason that only those who are mentally capable and who are *sui juris* can change their domicile; can acquire a new domicile. The element of volitional activity is very important as giving the proper *animus*. Persons who do not move about of their own free will cannot acquire a domicile of choice.[5]

These considerations make it at once apparent that members of the army and the navy are in a situation which is different from most other persons. Soldiers and sailors are not free agents. For the terms of their service they must go where they are sent. They cannot move about as they please. Even when on furlough or on leave they are subject to sudden and peremptory recall to their commands. They are amenable to military law in every respect. At the same time they are under the civil law. In the United States and England the civil law takes precedence over the military law excepting when such precedence might interfere with the safety of the State. When danger threatens the State the military law may for the period of emergency take precedence over the civil law. When the emergency is over the civil law resumes its

(1) 91 Central Law Journal, 4, 24.

(2) 92 Central Law Journal 264, 282. See also Levitt, The Custody of an Infant, 92 Central Law Journal 228, 250.

(3) Story, Conflict of Laws, Chapter 3; Dicey, Conflict of Laws, Chapter 2, and authorities there cited.

(4) Ibid.

(5) Ibid. See also Minor, Conflict of Laws, Chapter 4; Wharton, Conflict of Laws, Chapter 2.

sway. The control of the members of the army and the navy is, then, sometimes in the power of the civil law and sometimes in the power of the military law. For certain purposes also the control is in the military law, while for other purposes the control is in the civil law. These principles indicate the factors which must be considered when determining what the law is concerning the domicile of a member of the army or navy. In the decided cases the courts have balanced out the varying and, at times, conflicting considerations, and the results are here submitted. The cases consider and answer four main questions. These are: 1. What effect does entering the army or navy have upon the previously existing domicile of the entrant? 2. Can a member of the army or the navy change his domicile while he is in the service of his sovereign? 3. Can a member of the army or navy acquire a foreign domicile? 4. What effect does retirement from the army or navy have upon the capacity to acquire a new domicile or a foreign domicile?

These questions will be taken up in turn.

1. *What Effect Does Entering the Army or Navy Have Upon the Previously Existing Domicile?*—It seems to be settled that entrance into the military service does not cause a loss of the previously possessed domicile.[6] Some courts say that entrance into the army neither loses nor gains a domicile.[7] The reason seems to be that simply joining the army is not enough of an indication that one is trying to give up the old domicile and take a new one.[8]

This rule appears to be sound on principle. Domicile deals with the intention to acquire a home for an indefinite period. Entrance into the army or navy is entrance into a vocation or profession for a limited time, as by enlistment, or for an indefinite time, as by taking a commission. Service in the army, in various parts of the country or in foreign ports, does not preclude the intention to have and maintain a home in some one place even if one is not stationed at that place. Length of time during which one remains in the service is not an indication of intention to acquire a new domicile.[9] Though long residence at one place while in the service would be evidence of an intention to make that place one's home.[10] It would depend on the permanence of the post or station, I think. A post quarter-master sergeant, for example, in the regular army who is stationed at a permanent coast artillery post, and who is rarely moved about from post to post might very well intend to acquire a permanent home at the place where he is stationed. A corporal in an infantry outfit, which has just arrived in Manila, P. I., and is under orders to proceed with his command to a jungle post in central Mindanao, is hardly likely to intend to settle down in the jungle and consider it as his "home." If, however, the corporal marries a native woman, and, when the time comes for his command to return to the States, he "transfers" to the

(6) English Cases—Atty. General v. Napier, 6 Ex. 217 (1851); Brown v. Smith, 15 Beaven 444, 51 Eng. Rep. 609; Yelverton v. Yelverton, 1 Sw. & Tr. 574, 164 Eng. Rep. 866; Firebrace v. Firebrace, 4 P. D. 63; Ex parte Cunningham, 13 Q. B. D. (C. A.) 418. American Cases—Brewer v. Linnaeus, 36 Me. 428 (1853); Tibbets v. Townsend, 15 Abb. Prac. 221 (N. Y., 1862); Knowlton v. Knowlton 39 N. E. 595 (1895); Radford v. Radford, 82 S. W. 391 (1904).

(7) Stevens v. Allen, 71 S. 936 (1916); Ames v. Duryea, 6 Lansing 155, (1871).

(8) In re Macreight, 30 Ch. Div. 165 (1885). In this case an infant whose father was domiciled in Jersey received a commission in the British Army in 1854. He joined his regiment in England. He served with his regiment in different parts of the world. While his regiment was in Canada he died there in 1863. He had paid visits to Jersey when on leave. The Court held that he was domiciled in Jersey. Entering the army is not an indication of an abandonment of domicile. Furthermore, he was an infant when he entered the army and so could not acquire a domicile of his own. The Court said, "As I understand the rule of law it is this: A British subject does not by merely entering into the British army abandon his domicile, and his remaining in the army is no evidence of an intention to abandon the domicile which he had when he entered it. This as it seems to be determines the case. The intestate being an infant when he entered the army could not elect to change his domicile. What evidence is there of any subsequent intention to change his domicile? So long as he remained in the army time did not count, and there is really no evidence of any intention to change his domicile except the fact that he remained for nine years in the army. I therefore, decide that at the time of his death in Canada he retained the same Jersey domicile that he had when he entered the army," p. 167.

(9) Ibid.

(10) See note 3, supra.

outfit which is relieving his own, and he remains at the jungle post, such activity on his part is a good indication of an intention to make the jungle post his home for an indefinite period and the time he spends there may be an indication that he intends to acquire a new domicile at the jungle post. The intent, however, either to abandon the old domicile or to acquire the new one cannot be inferred simply from entering the service and living at one's station. Nor will a visit of the soldier's wife to the place where he is stationed make that station his domicile nor indicate an intention to change his domicile.[11]

2. *Can a Member of the Army or the Navy Change His Domicile While He Is In the Service of His Sovereign?*—It is difficult to say what the law is on this point. Three cases seem to hold that a soldier cannot acquire a new domicile while he is in the service of his sovereign. These are Stevens v. Allen,[12] Tibbets v. Townsend,[13] and The Attorney General v. Napier.[14]

In Stevens v. Allen, H, a minor, was appointed to the Military Academy from Louisiana, where his father was domiciled at the time. He was then commissioned in the regular army and after some time retired and returned to Louisiana. While in the service he married. After retirement he sued his wife for separation from bed and board in Louisiana. His wife never was in Louisiana. She entered a plea to the jurisdiction on the ground that she was not domiciled in Louisana and that he had acquired another domicile during his military service. The Court held that in the case of army and navy officers the law declares that "they neither lose the legal domicile that they leave nor acquire others in their travels."

In Tibbetts v. Townsend there were attachment proceedings insituted under a statute dealing with "non-residents." Townsend was domiciled in Olean and had land there. He enlisted in the army during the Civil War. He was sent to the Army of Virginia and served for three years in the South. He always intended to return to Olean and live there. The question was whether he was a non-resident of Olean and the Court held he was not, saying:

"The position that a drafted militiaman who is taken out of the State to serve in the army of the United States, thereby loses his residence and has his property subjected to harsh and summary process of attachment is too preposterous to be entertained for a moment. . . . To hold that a volunteer in the United States Army during the present rebellion can acquire a residence during his migratory and wandering service is simply absurd."

In The Attorney General v. Napier, a British born subject was an officer in the British army. He was sent on service to the East Indies. He died in the East Indies. The question was whether his personalty in England, his domicile at the time of of entering the army, had been lost so that England could not impose legacy duties upon such personal property. The Court held that an "officer going to the East Indies in Her Majesty's service did not acquire a domicile there so as to exempt his personalty from legacy duties in England."

These cases are supported by the reasoning in the case of Radford v. Radford,[15] which case was as follows:

H, a naval officer, had a domicile of origin in Kentucky. He was in active service in the Philippines. W, his wife, resided in New York. H and W agreed to a separation. Then H sued W for divorce alleging adultery. Suit was brought in Kentucky. Plea was entered that he was not domiciled in Kentucky. The Court held that he was domiciled in Kentucky and in support of its decision said:

"Being in the naval service of his country he is necessarily out of his native state

(11) Knowlton v. Knowlton, 39 N. E. 595; Brewer v. Linnaeus, 36 Me. 428.

(12) 71 So. 936.

(13) 15 Abb. Prac. 221.

(14) 6 Ex. 217.

(15) 82 S. W. 391.

whenever his duty calls him. He obeys the orders of his superiors and goes when and where they direct. It has never been the policy of the law to add to the burdens of one serving his country in its army or navy the loss of residence in his native state from his constrained and involuntary absence therefrom; such an one cannot be said, in any proper sense to have a residence anywhere other than the home he has left, since he has no choice as to where he goes, the time he can remain or when he shall return. In order to gain either an actual or legal residence there is, of necessity, involved at least the exercise of volition in its selection, and this cannot be affirmed of the residence of either a soldier or a sailor in active service . . . (The soldier or sailor) leaves his home involuntarily in the service of his country, and cannot be said in any sense to have lost either his actual or legal residence by so doing." (page 392)

This language, however, I submit, confuses two things which should be nept distinct. It confuses the volitional element involved in the choice of a new home with the volitional element involved in obedience to the orders of one's superior. The first is a factor to be considered when domcile is examined. The second has nothing to do with domicile. When a person joins the army he does not leave his home involuntarily at all. He joins the army. That means he must go where the army is sent. A voluntary taking of a position which means absence from a given place means the acceptance of such absence. It is a voluntary leaving of the place where one may be at the time of taking the position. Once in the army one is, of course, subject to orders of one's superiors. But the initial joining makes it a voluntary subjection to those orders. Even the drafted soldier does not need to obey orders. He has the alternative of court-martial and imprisonment for disobedience given to him. He chooses between the alternatives. In that, far, at least, his actions can be voluntary. But whether his leaving the old home is voluntary or not, such presence or absence of volition does not concern the acquisition of a domicile. The volition requisite for that is the intention to take a new place as a new home. Such an intention can be present even if the induction or continuance in the service was and is involuntary. If the intent to make a new place one's home is present and at the same time there is an act which makes the intent manifest, the requisites for the acquisition of a new domicile are fulfilled. Involuntary service may be an indication of the absence of intent or may not be. And so as to the temporary and migratory nature of the service. It may be of such a character and in such territory that the intent to make that territory one's home is negatived—as when one sees service in uncivilized countries. But some persons like to settle in uncivilized countries. Such persons may intend to make a place where they are but temporarily stationed their permanent home, and the migratory nature of their service may be just a means of getting them to the place where they find the spot which they wish thereafter to be their home. And finding the spot and being there and having the intent to return to it and remain indefinitely makes that spot their domicile. Actual length of stay is immaterial. Migratory nature of the service performed is of no importance. Volitional aspect of induction into the service can be minimized and even ignored.

This proposition grows out of the cases which hold that a member of the army or navy in active service can acquire a domicile of choice. The leading English case is that of Craigie v. Lewin.[16] In this case C was domiciled in Scotland. He went to India as an officer in the East India Company and acquired an Anglo-Indian domicile in India. He then returned to London and died there, leaving an holographic will. The question was whether his will should be governed by English or India law. The Court held that he had acquired a domicile in India while in the service of the India Company and that he had not relinquished

(16) 3 Curteis 435.

this domicile. The will was to be governed by the Indian domicile.

The leading American case is In re Grant's Estate.[17] G was domiciled in New York. He was appointed a Major General in the regular army. From 1902 to 1904 he had his headquarters at Fort Sam Houston, Texas. From 1904 to 1908 he was Commander of the Department of the East with headquarters at Governor's Island in New York Harbor. His headquarters then shifted to Chicago, and later back to Governor's Island, where he remained until his death. He resided wholly at his headquarters and had no residence elsewhere. While on a business trip to Washington he expressed the intention of buying a house there and making Washington, D. C., his home. He selected a house but did not purchase or rent it. He shipped some household furniture and uniforms to Washington. While on his way south he died while temporarily in a hotel in New York City. New York officials tried to appraise the estate so as to impose a transfer tax upon it. The question was as to the place of domicile of the deceased. The Court held that he was domiciled on Governor's Island, saying:

"When a federal officer breaks up his home and departs from a mere residence of choice to a permanent military station of the United States in federal territory, where he continually resides, certainly his residence de facto is there in federal territory, whatever his domicile of origin, his domicile de jure, or prior domicile of choice may be."

The Court supports its position by referring to the French Civil Code and says:

"The French Code, for example, now provides that when any office is for life, the presumption of law is that the domicile of the officer is where his function must be discharged."[18]

Three other American cases take the same position. In Ames v. Duryes[19] one X was born in Indiana, where his father was domiciled. At the age of 18 he was commissioned in the U. S. Army and ordered to Florida. When he became of age and while still in Florida he married. After that he kept house in Florida for about a year. Then he went to New York City to await orders. He lived in a boarding house with his wife and baby. His wife had made a will shortly before the baby was born. Soon after the baby was born the wife died. The will was admitted to probate in New York. According to the law of Indiana the birth of a child revokes a will; according to the law of New York the birth of a child does not revoke a will. The question was whether the will was properly admitted to probate or not. The Court held that it had been properly admitted. The Court reasoned as follows:

At the time of his appointment X was domiciled in Indiana, where his father was domiciled. The entrance of X into the army neither took away nor gave to X a new domicile. It was competent for X while a soldier in the army to abandon a domicile and acquire a new domicile just like any other person. When X set up housekeeping in Florida he acquired a domicile there. When he came to New York and lived in a boarding house with his wife and baby he acquired a domicile in New York. Hence, the wife of X was domiciled in New York at the time of her death and that law governs the will she left.

In Remy v. Board of Equalization[20] there was a writ of certiorari issued to review an assessment for taxes. The facts were that H, a naval officer, was stationed

(17) In re Grant's Estate, 144 N. Y. S. 567 (1913).

(18) French Civil Code 1895, Eng. Tr. by Henry Cachard, 1895. Section 106, "A citizen called to a temporary or revocable public office shall retain the domicile which he had previously unless he has manifested a different intention." Section 107: "The acceptance of an office conferred for life shall occasion an immediate transfer of domicil of the officer to the place where he is to fill his office." The German Civil Code provides as follows: "Sec. 9. A person in military service has his domicile in the place where he is stationed. In the case of a person whose command has no home station, the last home station of the command is deemed to be the place of his domicile. These provisions do not apply to persons in military service who are serving only their compulsory term of military service, or who may not establish a separate domicile." German Civil Code for 1900. Eng. Tr. by Chung Hui Wang, 1907.

(19) 6 Lansing (N. Y.) 155 (1871).

(20) 45 N. W. 899.

at Norfolk, Va. His wife lived there with him. She was originally domiciled in Iowa. She still owned a house in Iowa, within which house she still stored furniture. She did not intend to return to Iowa to live. H was then stationed to Washington, D. C., where he intended to live permanently. The Iowa tax board assessed W for her personal property. The Iowa law applied only to those domiciled in Iowa. The Court held that W was domiciled in Washington, with her husband; that H had acquired a valid domicile in Washington; and that the tax board in Iowa had no jurisdiction to levy a tax on the property belonging to W.

Ex parte White[21] deals with the assessment of a poll tax. D was an army officer in service at Portsmouth, N. H. Portsmouth assessed a poll tax upon him. He refused to pay the tax on the ground that he was an army officer in active service and had no domicile in New Hampshire. He was imprisoned. He sued out a writ of habeas corpus. The question was whether the writ should issue. The Court held that it should. The Court said:

"The general proposition that the presence of the army in a particular locality is not of its own volition, and is presumably only temporary, is subject possibly to the qualification that actual residence of members of the army in a given locality may be of such a fixed and permanent character as to exclude altogether the idea of a domicile or residence in any other locality, and to the further qualification that though one in the military service is subject to the orders of his superior officers, the circumstances may be such that he remains so far sui juris as to matters not involving his military duties, that he may if he so desires, change hs domicile and establish it at any place he sees fit. Thus it is apparent that there is no hard and fast rule governing all cases. Assuming the proposition that a member of the army may change his domicile if not inconsistent with military duties to be one based upon reason and established by authorities, the intent to change must be clear, and be asserted with something fixed and established." The learned Court then held that such intention had not been established in the instant case.

These cases, then, seem to establish the following propositions: (a) It is competent for a soldier or sailor to acquire a domicile while in service in the army or navy;[22] (b) He can acquire that domicile in a place to which he has proceeded under orders;[23] (c) The permanent quality of his presence will depend upon the character of his duties;[24] (d) The presumption that he is not voluntarily in the place of his station is subject to the character of his stay and the stay of the unit to which he belongs;[25] and (e) His ability to acquire a domicile is limited by the exigencies of his military duties.[26]

3. *Can a Member of the Army or Navy Acquire a Foreign Domicile?*—It would seem, from the little law that there is on the subject, that a member of the army or navy cannot acquire a domicile in a foreign territory.[27] The reason is that service with one sovereign is incompatible with the intention to make a permanent home in the territory belonging to another sovereign. Two English cases are all that the writer has been able to find that are in point. These are Hodgson v. Beauchesne[28] and Ex parte Cunningham.[29]

In Hodgson v. Beauchesne, H, a domiciled Englishman, was in the service of the East India Company. He came back to England on furlough. Then he went to France. By the rules of the company he was subject to call, at any time, to return to active service in India. While on fur-

(21) 228 Fed. 88.

(22) Craigie v. Lewin, 3 Curteis 435; In re Grant's Estate, 144 N. Y. S. 567; Ames v. Duryea, 6 Lansing 155; Remy v. Board of Equalization, 45 N. W. 899; Ex parte White, 228 F. 88.

(23) Mooar v. Harvey, 128 Mass. 219; Ex parte White, 228 F. 88; Craigie v. Lewin, 3 Curt. 435; In re Grant's Estate, 144 N. Y. S. 567.

(24) Craigie v. Lewin, 3 Curt. 435; Hodgson v. DeBeauchesne 12 Moore P. C. 285; Mooar v. Harvey, 128 Mass. 219; Ex Parte White, 228 F. 88.

(25) Ibid.

(26) Ibid.

(27) Hodgson v. DeBeauchesne, 12 Moore P. C. 285.

(28) Ibid.

(29) 13 Q. B. D. 418.

lough in France he died. The question was whether he had acquired a French domicile or not. The Court held that he had not, because that was incompatible with his service to the Queen and to the East India Company; and because, the presumption of law arising from his profession or status was against any intention by H to abandon his original domicile and acquire a new domicile as it would be inconsistent to presume an intention contrary to his duty as an officer in the military service of the Queen and the East India Company.[30]

In Ex parte Cunningham the question was as to the domicile of a debtor in bankruptcy proceedings. C had a domicile of origin in Ireland. He received a commission in the British army. It was held that service in the army did not give him an English domicile.

In this connection Dicey is of the opinion that a person who enters the military or naval service of a foreign sovereign probably acquires a domicile in the country of that sovereign.[31] He bases his belief upon an argument of counsel in Somerville v. Somerville.[32] I can see no reason for doubt in this case at all. Any Englishman can acquire a French domicile. What difference does it make whether the Englishman enters into the French army or navy, or not? Of course, an English *army officer* cannot acquire a domicile in France even if he joins the French army. That is inconsistent with his duties to England as an officer. But an English civilian has no duties toward his sovereign which conflict with acquiring a foreign domicile while serving in a foreign army.

4. *What Effect Does Retirement from the Army Have Upon the Capacity to Acquire a New Domicile of Choice or a Foreign Domicile?*—There is just one case that the writer has been able to find on this topic. It is Ex parte Barne.[33] Here Barne described himself in his own affidavit in bankruptcy proceedings, he being the bankrupt, as—

"Of 74 Avenue de la Toison d'Or, Brussels, Belgium; a retired officer in Her Majesty's Army."

The English court held that Barne was still domiciled in England. Lord Esher, M. R., said:

"The affidavit is conclusive to my mind that he is an Englishman by birth, and he does not pretend that he has changed his domicile."

Lindley, L. J., said:

"He has an English name, he has been an officer in the English Army, and he swore his affidavit before the English consul in Brussels."

This case, of course, simply says that Barne had not changed his domicile from an English to a French domicile. It does not decide that a retired officer cannot acquire a domicile in a foreign country. This case is, therefore, not an authority either one way or the other.

On principle I can see no reason why a person who has retired from active service and re-entered civil life has not re-acquired all the capacity he had to change his domicile and get a domicile of choice wheresoever he sees fit. If, however, he was on the "retired list" but was drawing pay from his government, and was subject to being called back to "the colors" for active service, then I think he could not acquire a foreign domicile. In the latter case he is still in the service of his sovereign, though not in active service.

The Reserve Officers' Corps in the United States presents, I think, a different situation. The Reserve Officers' Corps is

(30) See, however, Forbes v. Forbes, Kay, 356, where Woof V. C. said: "When an officer accepts a commission or employment the duties of which necessarily require his residence in India, and there is no stipulated period of service and he proceeds to India accordingly, the law from such circumstances presumes an intention consistent with his duties and holds his residence to be animus et facto in India."

(31) Dicey: Conflict of Laws, page 148.

(32) (1801) 5 Vesey 749, 757. See, also, Westlake, Private International Law, 313-315.

(33) 16 Q. B. D. 522.

really a civilian organization to the members of which certain military privileges, like the right to wear the uniform, etc., are accorded. Hence, members of the Reserve Officers' Corps are not precluded from acquiring a foreign domicile. If, however, the Corps is genuinely a part of the army, then members of the Corps cannot acquire a foreign domicile.

The militia of the various States are now, as I understand it, a part of the regular army organization. It would follow then that members of the militia cannot acquire a foreign domicile.

It is, of course, to be understood that all of this section, in the absence of any authority, can be only a most tentative bit of suggestion and is not presented as being the law.

Conclusions.—In conclusion, it is submitted that unless the exigencies of the military and navy service absolutely preclude the acquisition of a domicile of choice, a member of the army or navy is governed, as to choice of domicile, by the same rules that govern civilians.[34]

ALBERT LEVITT.

Grand Forks, N. D.

(34) An interesting case which discusses but does not decide the matters in this article is Pendleton v. Pendleton, 201 Pac. 62 (1921). The facts were that H was born on a military reservation at Ft. Sam Houston, Tex., at a time when his father was an officer in the U. S. Army, and claimed no other residence. His entire life was spent upon military reservations, except for short visits to relatives who were not living on military reservations, and he now holds a commission as a captain in the regular army. He claims his residence and domicile as being Ft. Riley only for so long a time as his duties kept him at that place. W, wife of H, sues him for divorce in Kansas. The divorce was not granted and the decision was affirmed by the upper court which said: "The plaintiff's husband went to Ft. Riley, not of his own choice but in obedience to military orders. The plaintiff accompanied her husband and makes no claim of domicile apart from that of her husband. So far as the findings disclose, neither one has any intention of abiding at Ft. Riley beyond the assignment of the defendant to that post. There is nothing whatever to indicate permanence of the assignment. Whenever military need for the defendant to be at Ft. Riley terminates, he will obey the order assigning him to another station, and it is not possible to affirm that Ft. Riley is the true, fixed, permanent home of the plaintiff. In view of the foregoing, it is not necessary to discuss the subject of the jurisdiction of the State of Kansas over to Ft. Riley Military Reservation, and the question whether or not an officer of the army of the United States may establish a domicile on such a reservation is not decided." (page 63.)

COMMON CARRIERS—LOSS OF HAND BAGGAGE.

TRACY v. GRAND CONCOURSE SERVICE CO.

192 N. Y. S. 88.

Supreme Court, Appellate Division (N. Y.), Jan. 13, 1922.

In the absence of any statute or ordinance requiring a license for persons furnishing automobiles and chauffeurs for hire, persons hiring a car and chauffeur from a company which did not solicit business on the streets or other public places, could not recover for the loss of hand baggage intrusted to the chauffeur while they were at luncheon, on the theory that defendant was a common carrier; it being under no obligation and not holding itself out as being ready and willing to furnish such services to the public at fixed charges.

John S. Slattery, of New York City, for appellant.

Hardy, Stancliffe & Whitaker, of New York City (William F. McDermott, of New York City, of counsel, and John L. Farrell, of New York City, on the brief), for respondents.

LAUGHLIN, J. Frederick S. Tracy and Henrietta R. Tracy are husband and wife. They were married on the 30th of September, 1920; and the recovery by each of them was for the loss of hand baggage intrusted on that day to a chauffeur in the employ of the defendant and in charge of the automobile hired for their use. The theory of the complaint in each action is that the defendant was liable as a common carrier and a bailee of the property. The only points presented by the appeal relate to whether the defendant was liable on either theory.

The causes were tried together before the court without a jury. Defendant was engaged in furnishing private limousines, also known as limousine broughams, together with chauffeurs, for hire, and its place of business was on the Grand Concourse at 188th street, New York City. Neither it nor its chauffeurs solicited business on the public streets or places. The hiring of its cars was arranged either by calls at its place of business or by telephone. The limousine from which the hand baggage was lost was hired for the wedding by Mr. Reess, Mrs. Tracy's father, who called at the defendant's place of business and contracted therefor a week prior to the date of the wedding. His interview was with one Dodd, who was the treasurer of the defendant and in charge of its office. According to the testi-

mony of Reess, he ordered one limousine to call at 2232 Andrews avenue to take his daughter's fiance to the Church of the Ascension, on 107th street near Broadway, where the marriage ceremony was to be performed, and the other to call at his own apartment to take his daughter to the church and to take the bridal couple and some of the bridal party from the church to the Waldorf-Astoria for luncheon, and there to wait for the bridal couple and take them to the Pennsylvania Station in time for the 4 o'clock train for Atlantic City. The limousines were sent pursuant to this arrangement, and Mr. Reess paid the agreed price per hour to the chauffeurs who were authorized to collect the charges. Mrs. Tracy testified that one of the limousines called to take her to the church, and that she and the maid of honor with three hand bags entered the car, and that the bags, two of which were hers, were placed in front next to the chauffeur, and were left there while they were in church and the marriage ceremony was being performed, and that then she and her husband and the maid of honor and best man entered the same limousine, in which, in the meantime, her husband's handbag had been placed with hers, and they were conveyed to the Waldorf-Astoria. Over objection and exception to the effect that it was not binding on the defendant, she was permitted to testify to a conversation with the chauffeur before they left the car, with respect to the care of the hand bags. She testified that she asked the chauffeur if he was to remain in the car while they were at luncheon, and on his answer in the affirmative she asked if he would mind the bags, to which he also replied in the affirmative, and that she again asked him if he was sure that he was to remain in the car, and said to him that, if he would not, they would check the bags, and that he answered, "All right, I will stay; don't you worry," and that they thereupon left the car, and after two or three hours came out of the hotel on the Thirty-Fourth street side and looked around for the limousine, but at first did not see the chauffeur, who soon came across the street to where they were and asked if they had taken two of the bags out of the car, and, on their informing him that they had not, he said, "Well then, they are stolen," and further said that he had stepped across the street under the hotel canopy to keep from getting wet, as it was raining, and that whoever took the bags must have opened the back door of the car and taken them out, for the two bags which were stolen were at the back and underneath the others. She further testified that one of the missing bags belonged to her and the other to her husband, and she gave the value of her bag and its contents. The testimony of Mr. Tracy was to the same effect with respect to the arrangement made with the chauffeur to care for the baggage, and he testified concerning his damages. In behalf of the defendant, Mr. Dodd testified that Mr. Reess selected the limousines, the use of which he desired for the wedding; that they agreed upon the price per hour, and that one of the cars was hired to take the bridal party to the hotel and from there to the Pennsylvania Station; that the cars selected were used only for wedding functions, and that nothing was said about baggage; that the defendant's chauffeurs were employed only to drive the cars and to collect the charges when so directed, and that it had no facilities in its cars for carrying baggage, and that it was unusual for its passengers to carry baggage; that the chauffeur did not report the loss to him, and he was unaware of it until Mr. Reess and Mrs. Tracy called upon him a week later; that the defendant's insurance policy did not cover the loss of baggage; that the chauffeur had been out of his employ about a month at the time of the trial, but was still friendly and promised to appear as a witness, but failed so to do.

I am of opinion that the recoveries cannot be sustained on the theory that the defendant was a common carrier. No statute or ordinance has been drawn to our attention, and we have found none, which require a license by the defendant for thus furnishing automobiles and chauffeurs, and it was under no obligation to furnish such service to the public at fixed charges, and did not hold itself out as being ready and willing so to do. See Allen v. Sackrider, 37 N. Y. 342; Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432; Stevenson & Co. v. Hartman, 231 N. Y. 378, 132 N. E. 121; Corpus Juris, Carriers, p. 38.

I am of opinion, however, that it was within the scope of the employment of the chauffeur sent out by defendant under this contract to assume the care of the hand baggage of the bridal couple, left in the car while they were in the hotel and while he was waiting for them to resume their journey with him, and that defendant in thus renting the limousines for the wedding was fairly chargeable with notice that the bridal couple, on being taken to a train for a journey to Atlantic City on their honeymoon, would have with them the ordinary hand baggage usually carried on such occasions, and that it was within the im-

plied terms of the contract that they might intrust such baggage to the chauffeur and leave it in the car while they left it temporarily, and that therefore defendant was liable as bailee for the loss of the property, which it has not explained. See Hasbrouck v. New York Central & H. R. R. Co., 202 N. Y. 363, 95 N. E 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912B, 1150; Morris v. Third Avenue R. R. Co., 1 Daly, 202; McKillop v. Reich, 76 App. Div. 334, 78 N. Y. Supp. 485; Rubin v. Forwarders' Auto Trucking Corporation, 111 Misc. Rep. 376, 181 N. Y. Supp. 451; Polack v. O'Brien, 114 App. Div. 366, 100 N. Y. Supp. 385; Goldstein v. Pullman Co., 220 N. Y. 549, 116 N. E. 376, L. R. A. 1918 B, 1060; Anderson v. Fidelity & Casualty Co., of New York, 228 N. Y. 481, 127 N. E. 584, 9 A. L. R. 1544.

The appellant further contends that the allegations of the complaint are insufficient to charge it with liability as bailee merely, and that they should be construed as predicating the liability solely on the theory that the defendant was a common carrier. I am of opinion that the allegations are sufficient to sustain a recovery on either theory. After alleging that it was a common carrier, it is alleged that the plaintiff as a passenger in one of its automobiles "for a certain journey" delivered the baggage to it and to its chauffeur for safe-keeping during the journey, and that it failed and refused, on demand duly made, to redeliver the same to plaintiff. These allegations sufficiently informed the defendant that the plaintiff intended to prove that the contract of hiring was such that the plaintiff was warranted in intrusting the custody of the hand baggage to the chauffeur.

There is no merit in the further contention that there was no privity of contract between the plaintiff and defendant. Mr. Reess plainly acted for the plaintiffs in making the contract.

It follows that the determinations of the Appellate Term should be affirmed, with costs.

NOTE—*Liability of Taxicab Company for Loss of Baggage.*—It is generally held that truckmen, wagoners and cartmen carrying goods for the public as common carriers, are practically insurers of baggage carried by them until the destination of its journey has been reached, when their responsibility as carriers ends. Responsibility of such a carrier in this respect does not wholly end or terminate upon the performance of his contract of carriage. He still remains under duty to exercise reasonable care for the safety of the property. Brown Shoe Company v. Hardin, 77 W. Va. 611, 87 S. E. 1014.

"In such cases there is a duty to make some provision for the safety of the property which usually consists of storage, although railroad companies and other common carriers are not engaged in the business of storage. The law recognizes the necessity of limited storage or custody for mere safety, as a necessary incident of the business of carriage. It cannot justly close its eyes to the numerous minor casualties, mishaps, and misadventures which may prevent appearance and demand at the place of destination. Moreover, it assumes that the parties impliedly contemplated some provision for the consequences as part of the contract. Ordinarily the owner is punctual in his appearance, production of his check, and claim of his property, and it does not occur to either party to make express provision for what is not likely to, but may occur, but the law does not assume their ignorance of such possibilities nor their intention to make no provision for them. On the contrary, knowledge thereof and also the intention to make some provision for the safety of the property in such an event, are assumed. Nor does even negligent failure to make a prompt appearance and claim justify abandonment. * * * Though the defendant's business was more limited than that of a railroad company or other carrier over long distances, the same general principle must be applicable to him. On the failure of the owner of baggage to call for it at its destination, his abandonment of it would have been equally as unreasonable and unjustifiable as that of any other carrier." Brown Shoe Company v. Hardin, 77 W. Va. 611, 87 S. E. 1014.

BAR ASSOCIATION MEETINGS FOR 1922—WHEN AND WHERE TO BE HELD.

American—San Francisco, Cal., August 9, 10 and 11.

California—San Francisco, August 7 and 8.

Florida—Orlando, June 15 and 16.

Georgia—Tybee Island, June 1, 2 and 3.

Iowa—Sioux City, June 22 and 23.

Kansas—Salina, November 27 and 28.

Kentucky—Louisville, latter part of June.

Louisiana—Monroe, May 5 and 6.

Maryland—Atlantic City, N. J., June 29 and 30 and July 1.

Michigan—Saginaw, June 9 and 10.

Minnesota—Minneapolis, August 30, 31 and September 1.

Mississippi—Vicksburg, April 26 and 27.

New Hampshire—New Castle, June 24.

New Jersey—Atlantic City, June 16 and 17.

North Carolina—Wrightsville Beach, June 27, 28 and 29.

Ohio—Cedar Point, July 5, 6 and 7.

Pennsylvania—Bedford Springs, June 27, 28 and 29.

Utah—Salt Lake City, first week in August.

Virginia—Lynchburg, June 6, 7 and 8.

Washington—Tacoma, August 1, 2 and 3.

Wisconsin—Fond du Lac, June 27, 28 and 29.

Wyoming—Laramie, June 15 and 16.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client**—Next Friend.—Where a next friend is not authorized to receive the amount of a judgment rendered in his favor, his attorney of record cannot receive it in the absence of a statute expressly so authorizing.—Southern Ry. Co. v. M'Kinney, U. S. C. C. A., 276 Fed. 772.

2. **Automobiles**—Collision.—Where a collision between a bicycle moving north on P. street and a truck which was being driven south and turned east into an interstecting street occurred after the turn was made at a point from 12 to 35 feet east of the east curb line of P. street, and the truck driver was then endeavoring to avoid the collision, held, that a nonsuit was proper; the facts showing that the bicycle rider was not giving such attention as he should to the manner of his going, and was guilty of negligence which contributed to, if it did not actually cause the accident.—Mehler v. Doyle.—Pa., 115 Atl. 797.

3.——Contributory Negligence.—A finding that the driver of an automobile who collided with a motor truck standing without lights near the middle of the street in the nighttime was not guilty of contributory negligence held not sustained by the evidence.—Jones v. Sunshine Grocery & Market .—Tex., 236 S. W. 614.

4.——Lien for Damages.—The statute making a motor vehicle operated in violation of law or negligently subject to a lien for damages caused thereby, subjects the vehicle to such lien, regardless of whether the owner of the car or the person illegally or negligently operating it is personally liable for the injuries.—Hall v. Locke, S. C., 110 S. E. 385.

5.——Nuisance.—A Ford car, having a bent front axle and bent radius rods, and which swerves and lurches from one side of a street to the other when it is being propelled, is a nuisance, and the law pertaining thereto is the ordinary rule governing the care and keeping of dangerous istrumentalities and the owners of it are bound to take exceptional precautions to prevent its doing mischief to persons or property.—Tannahill v. Depositors' Oil & Gas Co., Kan., 203. Pac. 909.

6.——Railroad Crossing.—The failure of an automobile driver to stop before crossing interurban trolley tracks does not bar his recovery.—Keck v. Pittsburgh, H., B. & N. C. Ry. Co., Pa., 115 Atl. 825.

7.——Street Crossing.—It was the duty of the driver of a motor truck approaching a crossing where the traffic was dense to exercise care of the highest degree, to give warning of his approach and have his car under such control that it could be stopped promptly.—Mooney v. Kinder, Pa., 115 Atl. 826.

8. **Banks and Banking**—Authority of Cashier.—Cashier of bank, without being authorized by the action of the board of directors, has no authority to receive anything but money in payment of a note belonging to the bank, and has no authority to agree with the maker of a note to take mortgaged property securing it in payment thereof.—People's Bank of De Soto v. Presnell, Mo., 236 S. W. 401.

9.——Mismanagement.—The damages resulting from the gross negligence and mismanagement of the directors of a national bank resulting in the waste of its assets is an asset of the bank, and not of a stockholder, and, when recovered, should go to the bank for the payment of its liabilities and for distribution of any balance, in case the bank is not permitted to continue business among the shareholders.—Dawkins v. Mitchell, La., 90 So., 396.

10. ——Notice.—In action for money had and received, bank's liability depends on notice, not actual knowledge of ownership of money.—Thomas v. Farmers' Nat. Bank of Ludlow, Mo., 236 S. W. 376.

11. **Bills and Notes**—Failure of Consideration.—Where stockholders of bank to avoid involuntary assessment subscribed certain amounts to be paid to trustees to enable trustees to purchase securities from bank which bank examiner had directed bank to dispose of, a stockholder could not set up failure of consideration to avoid payment of note to bank for amount subscribed, for which bank gave trustees credit on purchase price of securities hereafter delivered by bank to the trustees, since, being a beneficiary under the trust, he could not retain the full consideration for which the note was executed and at the same time say that there was a failure of consideration.—Continental Nat. Bank of Los Angeles v. Doyle, Cal., 203 Pac. 780.

12——Gambling Debt.—A check given in payment of a gambling debt is null and void, even in the hands of a bona fide holder for value.—Fleischer v. Wolf, N. Y., 191 N. Y. S. 691.

13.——Interest.—When a debt bears interest by contract or operation of law, an agreement by the parties for an extension of the time of payment for a definite time binds the creditor to forbear suit during the time of the extension, and the debtor to forbear to discharge the debt and thereby stop the accrual of interest, and the accrual of interest is a sufficient consideration for the creditor's promise of forbearance, and hence an agreement to extend the time of payment of an overdue installment of interest on notes secured by a deed of trust was supported by a valid consideration.—Ward v. Scarborough, Tex., 236 S. W. 434.

14. **Brokers**—Commissions.—Instructions directing verdict for plaintiff in action for commissions by a broker who set on foot negotiations finally culminating in a trade, though the exchange was finally consummated by a new party, of such negotiations were the "moving cause of the exchange is erroneous; it being necessary that plaintiff's should have been the procuring or inducing cause, and "moving cause" not being the esuivalent thereof.—English v. Page, Mo., 236 S. W. 392.

15.——Limit of Time.—Where a contract to sell land contains no limitations as to time, the employment is for a reasonable time, or until the agency is revoked.—Beaty v. Muller, Mo., 236 S. W. 374.

16. **Carriers of Goods**—Conversion.—Refusal of carrier to deliver to consignee except on signing certain receipt held conversion.—Fred F. Shields Co. v. Chicago & N. W. Ry. Co., Neb., 186 N. W 332

17. **Contracts**—Good Will.—In action on a note given in consideration of the sale of physician's practice in certain vicinity, in which defendant claimed that plaintiff had violated his agreement not to engage in the practice of medicine in such vicinity, evidence that plaintiff engaged in the practice of medicine in such

vicinity subsequent to the maturity of the note was admissible, in the absence of a provision in the contract making it invalid on defendant's failure to pay note at maturity.—Clabaugh v. Heibner, Mo., 236 S. W. 396.

18.——Termination.—Where a contract for the manufacture by plaintiff for defendant of a stated quantity of chemicals monthly was made by both parties in view of the abnormal demand and prices created by the war, though the contract named a stated term, a provision that such quantity should be produced "for the present and until further notice" held to give defendant the right to terminate it on reasonable notice.—General Supply Co. v. Marden, Orth & Hastings Co.—U. S. C. C. A., 276 Fed. 786.

19. **Corporations**—Fraudulent Acts of Agents.—A corporation is bound by the unlawful or fraudulent acts of its agents within the scope of their employment, and notice of such wrongful acts is imputed to the corporation, but this rule does not extend to the imputing of such notice to the officer of the corporation without actual notice or connection with the transaction, and in matters affecting his private and independent dealings with the corporation.—Pitman v. Walker, Cal., 203 Pac. 739.

20.——Use of Patents.—The directors and stockholders of a corporation who signed the contract granting an exclusive license to manufacture and sell under the corporation's patents cannot attack the contract on the ground that it conveyed the assets of the corporation, and thereby prevented it from performing the duties for which it was organized.—Caddo Rock Drill Bit Co. v. Reed, La., 90 So. 388.

21. **Customs Duties**—Intoxicating Liquor.—The master of a ship is not liable for the penalty imposed by Rev. St. § 2809, by omitting goods and chattels from the manifest that are not in a legal sense adapted to or susceptible of entry in the custom house, and hence is not liable for failure to include intoxicating liquors, which is not merchandise in a legal sense, unless imported in a manner authorized by the provisions of the Prohibition Act.—United States v. Hana, U. S. D. C., 276 Fed. 818.

22. **Divorce**—Alimony.—Where a wife entered her appearance in her husband's divorce suit, so that the court had jurisdiction of the parties, the refusal to hear a motion for temporary alimony prior to the return term was not justified by a rule of court not to hear such motions prior to the return term, as, under Rev. St. 1919, § 2619, rules of court in contravention of any legal rights of the litigants are inoperative.—State v. Utz, Mo., 236 S. W. 386.

23——Prior Divorce— On motion by defendant for new trial in a divorce suit, an affidavit concerning facts in a prior divorce between the same parties and actions prior to their first marriage was inadmissible, the matters referred to in the affidavit having, occurred long prior to the marriage under consideration, and the first divorce decree being in plaintiff's favor and res judicata.—Coons v. Coons, Mo., 236 S. W. 358.

24. **Eminent Domain**—Overflow of Land.—The permanent water level of a reservoir as fixed by the height of a spillway in the dam when constructed constitutes a taking at that time of all lands below such level liable to be submerged by the rise of the water in the reservoir.—Cleveland, C., C. & St. L. Ry. Co. v. Vettel, Ind., 133 N. W. 605

25.——Remedy at Law.—Where the only injury inflicted on the owner of property abutting on the street by the closing of a portion of the street was depreciation in the market value of his property, the remedy at law was adequate, and an injunction to restrain the closing was properly denied.—Burroughs v. City of Dallas, U. S. C. C. A., 276 Fed. 810.

26. **Frauds, Statute of**—Description of Land.—In a contract for the sale of land, a description of the land which is consistent, but incomplete, and from which the land can be identified, is sufficient to authorize the admission of parol evidence identifying the land; but where the description cannot be completed and th land identified without making a new description, as where it is for a part only of a specified tract, with nothing to indicate what part the description cannot be completed by parol, and the land identified.—Thompson v. Griffith, Ind., 133 N. E. 596.

27.——Reformation of Lease.—Where majority of the controlling stockholders of a corporation leased its property as the property of one of them individually with the fraudulent scheme and intent to limit the rights and estate of lessee, the statute was unavailing in a action by lessee to reform the lease by inserting the name of the corporation as the true landlord, since the statute cannot be made a vehicle for perpetration of a fraud.—Zimmerman v. Goodman Mortgage & Realty Co., N. Y., 191 N. Y. S. 698.

28. **Highways**—Nuisance.—A structure designed to carry an aqueduct across a highway consisting of solid masonry and earth embankments extending into the highway about 33 feet on its westerly side and about 13 feet on the easterly side, leaving a roadway under the arch of but 20 feet, is a public nuisance unless legal authority exists therefor.—Town of Mt. Pleasant v. City of New York, N. Y. 191 N. Y. S. 741.

29. **Insurance**—Agency.—Where insurance company's contract with agent did not provide for an exclusive agency in the stipulated territory, the company had the right to put other agents in such territory.—Southern States Life Ins. Co. v. Hodges, S. C. 110 S. E. 406

30.——Beneficiaries.—Where a benefit certificate provided that the benefit should be paid at assured's death to "wife and children," persons answering the description of the class designated at the time of assured's death are the beneficiaries and assured's surviving second wife is a beneficiary, although the certificate was issued during the life of assured's first wife.—Modern Woodmen of America v. Allin, Ill., 133 N. E. 677.

31.——"Life Policy."—An industrial policy issued under Rev. St. 1919, §§6194—6202, providing for payment of specified amount on receipt of due proof of insured's death during continuance of policy, held a life policy required to be in good standing at time of insured's death and not an accident policy on which beneficiary could recover if in good standing at time of accident, notwithstanding disability clause providing for payment of insurance in case of total permanent disability, or provision that on insured's death within six months from date of execution the amount of insurance should be reduced one-half, "unless death shall have been caused by accident."—Jones v. Prudential Ins. Co., Mo., 236 S. W. 430.

32.——Minor Employee.—That an employee, who sued his employer for injuries, was under 16 did not absolve the employer's insurance carrier from liability for failure to defend the suit and pay attorney's fees, since the employer may have complied with provisions of the law making the employment legal.—Southern Surety Co. v. Columbian Ins. Co. of Indiana, Ind., 133 N. E. 611.

33.——Payment of Premium.—In the absence of an express agreement by the insurer to accept premium notes as an absolute payment of the premium, such premium cannot be considered paid; a mere promise to pay not being an effective payment.—Keller v. North American Life Ins. Co., Ill., 133 N. E. 726.

34.——Proof of Loss.—Formal proof of loss under tornado policy was waived by insurer, where an adjuster, on notice of loss, went to the premises and denied liability.—Ferguson v. Home Ins. Co., of New York, Mo., 236 S. W. 402.

35.——"Riot or Civil Commotion."—The words "riot or civil commotion" as used in a policy of burglary insurance will be given their popular or usual meaning, and as used in the policy in suit, held to imply the wild or irregular action or tumultuous conduct on the part of three or more persons assembled together for the purpose of doing an unlawful act.—Kirshenbaum v. Masachusetts Bonding & Ins. Co., Neb., 186 N. W. 325.

36.——Time to Sue.—A by-law of fraternal insurance company postponing time to sue till expiration of insured's expectancy of life, notwithstanding the common-law presumption of his death, is within Rev. St. 1919, § 2166, declaring void any part of an agreement limiting or tending to limit the time in which action may be instituted; for the term "limit or tend to limit" the time within which suit may be brought does not apply exclusively to shortening the time but also applies to undue postponement of right to sue.—Cobble v. Royal Neighbors of America, Mo., 236 S. W. 306.

37. **Intoxicating Liquors**—Admissible Evidence.—In a prosecution for violation of the National Prohibition Act, where the government agent procured tags used for making purchases, held that there was no error in the admission of the tags in evidence.—Cabiale v. United States, U. S. C. C. A., 276 Fed. 769.

38 **Landlord and Tenant**—Lease.—In the absence of fraud, deceit or concealment, a lessor is not liable in damages to the lessee for defects in a building which are plainly discernible, when liability therefor is not reserved in the lease.—Lowe v. Payne, Neb., 186 N. W. 320.

39.——Summary Proceedings.—In landlords' summary proceedings to recover possession for their own occupancy, the evidence to justify an order for the tenant must call into serious question the landlords' good faith in seeking possession for their own occupancy.—Belluardo v. Gallinger, N. Y., 191 N. Y. S 722.

40. **Logs and Logging**—Removal of Timber.—Timber deed providing for removal when grantee "so desires" construed to require removal in reasonable time without necessary delay.—Livingston v. Drew Lumber Co., Fla., 90 So. 466.

41. **Master and Servant**—Assumption of Risk.—An expert employed by railroad to repair leak in tank car containing interstate shipment of casing-head gasoline assumed the risk of an explosion when he disregarded instructions on the dome and loosened the dome cap and caused the explosion, and could not recover under the federal Employers' Liability Act, though the yardmaster who employed him was assisting him.—Clement v. Gulf, C. & S. F. Ry. Co., Tex., 236 S .W 714

42——Defective Railway Track.—If a railway track was defective at a street railway crossing, and the railway company was guilty of negligence in maintaining it in that condition, and a switchman was thrown from a car and killed by reason of such negligence, it was not essential to liability that the car should have violently dipped or surged.—Burtch v. Wabash Ry. Co., Mo., 236 S. W. 338.

43.——Hazardous Occupations.—Under Const. Ariz. art. 18, § 7, making an employer in a hazardous occupation liable for injuries caused by an accident due to conditions of the occupation, and not by the negligence of the employee regardles of the employers' negligence that complaint for injuries in a mine does not count on defendant's negligence is immaterial.—Drazich v. Ray Consol. Copper Co., U. S. C. C. A., 276 Fed. 801.

44.——Negligence.—An experienced metal worker employed by a master engaged in the business of repairing gasoline tanks had a right to rely on the assumption that a gasoline tank had been properly cleaned, and that the danger from explosive gas had been eliminated, when he received instructions that the tank was ready for repair.—McDonald v. Morrison Plumbing & Sheet Metal Co., Mo., 236 S. W. 418.

45.——Negligenc of Servant.—Where a servant, while driving an automobile, in his master's service, from the garage where it was kept to his place of employment, deviates slightly from the direct route, the master will, not, merely on account of such deviation, be relieved from responsibility for the servant's negligence in the use of the automobile, whereby a third party is injured.—Ryne v. Liebers Farm Equipment Co., Neb., 186 N. W. 358.

46.——Safe Place.—It is not the duty of the master to free the woods of dead trees before its employes enter upon their work of felling trees, and master is only liable for negligence in failing to provide a reasonably safe place considering the dangerous nature of the work, and recovery can not be had for the death of an employe through the fall of a dead tree while he was running after felling a live tree where there is no evidence connecting the fall of the dead tree with the felling of the live tree.—Kinsey v. Colleton Cypress Co., S. C., 110 S. E. 395.

47.——Stage Driver.—Where defendant was a member of an auto stage association, a co-operative business association authorized by Civ. Code, §§ 653b-6531, under whose by-laws each member owned and operated his own stage along the prescribed routes and retained the profits derived therefrom, though the terminals and certain other facilities were managed by the association, the owner and operator of the stage, and not the association, is the master of the driver, and liable for his negligence.—Frierson v. Pacific Gas & Electric Co., Cal., 203 Pac. 788.

48. **Mortgages**—Lien.—Where a lien on property is acquired by the due execution and record of a mortgage "while the construction or repair of buildings, etc., on the property * * * is in progress," such mortgage lienor takes with notice that labor is being performed and materials furnished, for which liens may have been acquired, and such mortgagee must ascertain at his peril what liens have been acquired prior to the recording of the mortgage by persons who have begun to furnish labor or material for construction or repairs on the property.—People's Bank of Jacksonville v. Arbuckle, Fla., 90 So. 458.

49. **Municipal Corporations**—Defective Sidewalk.—Where plaintiff was injured on account of the defective condition of a coal hole in the sidewalk in front of a police station, the city was immune from liability as an abutting landowner and its liability can only be predicated, if at all, on the same duty that rests upon it in respect of any coal hole, to remedy or guard against a dangerous condition of which it had notice.—Ross v. City of New York, N. Y., 191 N. Y. S. 744

50.——Public Improvements. — Local Improvement Act, § 57, providing that if, any special assessment or special tax for public improvement has been declared void or invalid for any reason whatever, a new tax may be made and returned, and section 58, providing that a tax shall not be held invalid because levied for work already done, when the improvement was done under contract let in a legal way and under the direction of the board of local improvements and had been accepted by it, authorize levy of an assessment for completed work whenever any prior ordinance had been held invalid or void, whether it was an original or supplemental ordinance, or whenever for any reasons the special supplemental proceedings have been held void.—Village of Winnetka v. Taylor, Ill., 133 N. E. 653.

51.——Unauthorized Purchase.—A contract by the chief of a city's fire department for the purchase of fire extinguishers with which to fight a fire then raging was not binding on the city, when it did not appear that he was authorized to make it.—Pyrene Mfg. Co. v. City of Atlanta, Ga., 110 S. E. 408.

52.——Use of Public Park.—A city cannot, by lease, estoppel, or otherwise, grant to any person or association the use and control of such part of its public park as to practically deprive the public continuously of its enjoyment, nor delegate the use and control thereof to private individuals or associations.—Nebraska City v. Nebraska City Speed & Fair Ass'n, Neb., 186 N. W. 374.

53. **Principal and Agent**—Liability of Agent.—Where seller's offer was addressed to "Eastern Leather Goods" and the acceptance was signed by "The Eastern Leather Speciality Company" followed by the name of employee of person who was doing business under such

name, seller could not recover against such employee personally on theory that agent who signs his own name is liable even though seller did not know who the proprietor of the business was.—Rabinowitz v. Zell, N. Y., 191 N. Y. S. 720.

54.. **Railroads**—Cattle Guards.—The court properly overruled the general demurrer to the petition, by which the plaintiff sought to recover damages because of failure of the railway company to maintain proper cattle guards at the intersection of its tracks and an alleged private way, established pursuant to law.—Savannah & A. Ry. v. Hart, Ga., 110 S. E. 410.

55.——Contributory Negligence.—There is no presumption that a person killed by a collision with a train at a railroad crossing exercised ordinary care, though there is no evidence to the contrary, and though the jury could not find contributory negligence in the absence of evidence thereof.—Pennsylvania Co. v. Clark, Ind. 133 N. E. 588.

56.——Crossings.—In an action for injuries received at railroad crossing, evidence that there was no watchman, electric bells, or signals at the crossing was competent on question whether due care was exercised, but it was error to admit evidence that automatic signals and bells were used at other highway crossings.—Lake Erie & W. R. Co. v. Johnson, Ind., 133 N. E. 732

57.——Crossings.—Where an automobile driver at a crossing where gates were maintained and the rails had been raised above the level of the ground stopped between the gate and the track and he and those with him looked both ways before starting to cross, but his engine stalled when the wheels dropped over the rail and he was struck by a train, which because of a curve could have been seen for only about 32 seconds before the collision, a demurrer to the evidence on the ground of contributory negligence was properly overruled. Stookey v. St. Louis-San Francisco Ry. Co. Mo., 236 S. W. 426.

58.——Repairs to Bridge.—Under section 8462 of the General Statutes of 1915, it is the duty of a railroad company to replace a bridge that has been destroyed by high water, where the bridge constitutes a part of the approach of a public highway to the crossing of the railroad track, and the erection of the bridge has been made necessary by the construction of the railroad.—McPherson County v. United States Railroad Administration.—Kan., 203 Pac. 912.

59.——Use of Terminal Facilities.—A railroad which furnished shipping facilities to some shippers in switching district could not complain of order of Public Utilities Commission requiring it to furnish like facilities with respect to coal to be transported to other section of the state over line of other railroad, for company against which it had discriminated, on the ground that the order violated Public Utilities Act, art. 4, § 44, by requiring the railroad to give the use of its terminal facilities to another carrier engaged in like business.—Public Utilities Commission ex rel. Hillsboro Coal Co. v. Cleveland C., C. & St. L. Ry. Co. —Ill, 133 N. E. 722.

60.——Value of Services.—Where a station agent, who had been acting as such for railroad under contract requiring railroad to give him annual pass as compensation for such services, continued to perform services on railroad's failure to issue the pass because of laws prohibiting such issuance, and where railroad continued to accept such services, it became liable to agent for the reasonable value of the services.—Payne v. Elliott, Ind., 133 N. E. 751.

61. **Sales**—Title to Goods.—Where plaintiffs sold defendants a carload of apples, but refused to deliver except through their own truckman, who was unable to find storage room for part of the apples where defendants directed them to be stored, and left them on a pier where they were stolen, since the boxes were in the constructive possession of plaintiffs through their truckman until delivery, under Personal Property Law, § 100, rule 5, title did not pass, and defendants were not responsible for the loss.—Cochran v. Friedman, N. Y. 191 N. Y. S. 729.

62. **Taxation**—Massachusetts Trust.—A Massachusetts trust, constituting an arrangement whereby the legal title to property is conveyed to trustees, who executed a declaration of trust to hold and manage it for the benefit of holders of transferable certificates issued by trustees, is not subject to the tax on capital stock imposed by Revenue Act 1916, § 407, providing for payment of tax by "every corporation, joint-stock company, or association * * * having a capital stock represented by shares," and Revenue Act 1918, § 1000 (Comp. St. Ann. Supp. 1919, § 5980n et seq.), providing that in lieu of such tax imposed by such act of 1916, "every domestic corporation shall pay annually a special excise tax," and section 1 (section 6371¼a) defining the term "corporation" to include associations, stock companies, and insurance companies; such a trust not being an "association" or a "corporation," within the statute, in view of the character of the tax imposed as an excise tax imposed on the privilege of doing business in corporate or quasi corporate form.—Hecht v. Malley, U. S. D. C., 276 Fed. 830.

63. **Wills**—Construction.—A will providing, "In the event of my leaving legitimate issue I annul this entire will and give, bequeath and devise to my wife my entire estate, whether the same be real, personal or mixed property, to herself, her heirs, executors and assigns, in fee and absolutely free from any trust or restrictions," mentioned after-born children within the meaning of Decedent Estate Law, § 26, providing that an after-born child not provided for by settlement, nor in any way mentioned in the will, shall succeed to the same portion of the parent's estate as if the parent had died intestate—In re Dick's Will, N. Y. 191 N. Y. S. 762.

64.——Intent.—Where decedent provided a gift "to each of my five (5) sisters share alike, * * * one-fourth (¼) of all the rest * * * of my estate * * * wheresoever situated," held, that the residuary estate should pass in equal parts to the five sisters; the language of the will prohibiting a construction that decedent gave one-fourth to her five sisters and died intestate as to the rmaining three-fourths. —In re Vismar's Estate, N. Y. 191 N. Y. S. 752.

65. **Witnesses**—Secondary Evidence.—Where plaintiff denies that a written contract, which defendant testifies is in his possession, ever existed, or that he ever had such a paper, such a denial furnishes sufficient foundation for the introduction of secondary evidence of the contents of the paper, without the service of a notice to produce the paper, or the issuance and service of a subpoena duces tecum.—Dold v. Munsor, Neb., 186 N. W. 353.

66. **Workmen's Compensation Act**—"Arising Out of Employment."—Acts necessary to life, comfort, and convenience of a workman while at work, though personal to himself are incidental to the work so that an accident consisting of the entrance of typhoid germs into his system by reason of drinking polluted water to quench thirst while at work is one arising out of the employment within the Workmen's Compensation Act.—Wasmuth-Endicott Co. v. Karst, Ind, 133 N. E. 609.

67.——Assault by Fellow Employee.—An injury inflicted upon an employee by a fellow employee not arising from any order, direction, duty or act connected with the employment, but arising out of and occurring during or immediately following a personal altercation between the two concerning matters not arising out of the performance or supposed performance of any duty or service in the employment, and resulting from what amounted to an assault by one upon the other, is not such an injury as will entitle the injured employee to compensation from the employer under the Workmen's Compensation Act.—Urak v. Morris & Co., Neb., 186 N. W. 345.